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No. 87-

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:

JOSEPH P. MANNERS
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOSEPH GUERRIERI, JR.
(Counsel of Record)
JOHN A. EDMOND
MARTHA WALFOORT
GUERRIERI, EDMOND & JAMES
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 296-7002

Attorneys for Petitioner

56874



QUESTIONS PRESENTED

1. Does the 1942 decision of this Court in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), today bar the issuance of a status quo injunction under the Railway Labor Act after a union has been certified but before a collective bargaining agreement has been negotiated?

2. Did the court of appeals err in sanctioning unilateral actions by a carrier while the parties exhaust the procedures of the Railway Labor Act?

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IN THE
Supreme Court of the United States

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No. 87-

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,
v.

TRANS WORLD AIRLINES, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner International Association of Machinists and Aerospace Workers prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 19, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 809 and is printed as Appendix A hereto, *infra* at App. 1a-12a. The memorandum opinion and order of the United States District Court for the District of Columbia (Oberdorfer, J.) is reported at 654 F. Supp. 447 and is printed as Appendix B hereto, *infra* at App. 13a-29a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 19, 1988 (App. 2a). On May 10, 1988, Chief Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including June 18, 1988. A copy of that order is printed as Appendix C hereto, *infra* at App. 30a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

Relevant provisions of the Railway Labor Act, as amended, 45 U.S.C. §§ 151, *et seq.* (1982), are printed as Appendix D hereto, *infra* at App. 31a-34a.

STATEMENT OF THE CASE

On May 23, 1986, the National Mediation Board ("NMB") certified the International Association of Machinists and Aerospace Workers ("IAM") as the designated collective bargaining representative of approximately 4,330 passenger service employees of Trans World Airlines, Inc. ("TWA").¹ Despite this Certification, TWA refused to meet and negotiate with the IAM over rates of pay, rules and working conditions, as required by the Railway Labor Act (the "Act").² The carrier further

¹ The NMB's Certification of the IAM is printed as Appendix E hereto, *infra* at App. 35a-36a.

² Section 2, Ninth of the Railway Labor Act provides in pertinent part that "[u]pon receipt of [a] certification, the carrier shall treat with the representative so certified as the representative of the craft or class for purposes of this chapter."

Section 2, First provides that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

violated the Act by unilaterally changing the working conditions of the passenger service employees newly represented by the IAM. For example, TWA assigned job duties historically performed by passenger service employees to employees in other crafts. TWA also intended to make additional unilateral changes.

On June 10, 1986, TWA filed an action in the United States District Court for the Southern District of Texas seeking to set aside the NMB's Certification. On July 8, 1986, the IAM filed an action in the United States District Court for the District of Columbia seeking equitable relief against the actions of TWA that violated the Act. After the action commenced by TWA was transferred to the District of Columbia and consolidated with the IAM's pending action, the IAM moved for summary judgment. It contended (1) that its Certification by the NMB was valid, and (2) that TWA had violated the Act by refusing to bargain with the IAM and by unilaterally changing the working conditions of IAM-represented employees. The IAM requested that the court enforce the status quo provisions of the Act by restoring working conditions as they existed on the date the IAM was certified by the NMB.

By memorandum and order dated February 18, 1987, the district court granted the IAM most of the relief it sought. The court upheld the Certification of the IAM by the NMB.³ The court further held that TWA's refusal to bargain violated the "clear command" of Section 2, Ninth of the Railway Labor Act, which provides that "[u]pon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." In addition, the district court held that TWA's refusal to bargain with the IAM violated the duty im-

³ That ruling is the subject of a pending petition for certiorari filed by TWA on May 19, 1988 (87-1918).

posed by Section 2, First of the Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions." Finally, the court found that TWA's actions violated the Act's protections against employer interference with the employees' rights to organize and assist the union of their choice. Section 2, Fourth. Noting that TWA "simply defied the statutory command and took the law into its own hands," the district court ordered TWA to bargain with the IAM (App. 20a).

The district court denied the IAM's request for an order restoring the status quo as it existed on the date of the NMB's Certification. While acknowledging that Section 2, Seventh of the Act⁴ precludes a carrier from changing working conditions without first complying with the procedures set forth in Section 6 of the Act,⁵ the court nonetheless held that it was precluded from ordering compliance with the status quo provisions of Section 6 by this Court's decision in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). Despite its recognition that the "potential scope" of *Williams* was "substantially narrowed" by the subsequent decision of this Court in *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142 (1969), the district court held that *Williams* "precludes the relief sought by IAM with respect to changes in working conditions heretofore effected" (App. 21a-22a). The district court did, however, enjoin *prospective* changes in the status quo on the basis that such relief was consistent with *Williams* and TWA's statutory duty to bargain (App. 22a-23a).

⁴ Section 2, Seventh provides that "no carrier . . . shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in [Section 6 of the Act]."

⁵ Section 6 provides that "rates of pay, rules or working conditions shall not be altered" during the period from notification of a change in agreements through mediation proceedings.

TWA appealed from the district court's judgment enforcing the NMB's Certification of the IAM and from the court's issuance of the prospective injunction. The court of appeals affirmed the NMB's Certification of the IAM. It reversed the prospective injunction issued by the district court as violating the ruling of *Williams*. Although the court acknowledged that the "precedential force" of *Williams* had been eroded by subsequent decisions of this Court, it concluded that *Williams*, "though weakened, is not dead" (App. 11a).

Although it recognized that the district court's power to issue the injunction could be found in the legally enforceable duty to bargain imposed by Section 2, First, the court disallowed the injunction because the parties had not exhausted the procedures of the Act (App. 12a). The court considered itself "constrained to conclude that so long as *Williams* remains the law, the District Court lacks the power to employ this drastic measure, absent a showing of unavailability or ineffectiveness of other remedies" (App. 12a).

REASONS FOR GRANTING THE WRIT

By this petition, the IAM respectfully requests this Court to reconsider its 1942 decision in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386. Not only has *Williams* been implicitly discarded by subsequent cases of this Court, but the decision undermines the policies of the Railway Labor Act. As this case illustrates, *Williams* encourages a newly organized employer (as well as a newly certified union) to disregard the mandate of the Act to "exert every reasonable effort" to negotiate an agreement. *Williams* encourages instead the self-help measures that violate the letter and spirit of the Act.

This petition also asks the Court to reverse the court of appeals' refusal to enforce the status quo provisions of Section 2, First because its ruling is in direct conflict with the decision of this Court in *Detroit & Toledo Shore Line*

R.R. Co. v. United Transportation Union, 396 U.S. 142 (1969).

The court of appeals held that the status quo provisions of the Act cannot be invoked here because (1) the explicit status quo provisions of Section 6 do not apply prior to the negotiation of an initial collective bargaining agreement between the parties; and (2) the implicit status quo provisions of Section 2, First do not apply prior to completion of negotiations and the other dispute resolution procedures contained in Section 6 of the Act. Both of these rulings defeat the central policies of the Act by encouraging self-help at the very point at which the parties are directed to "exert every reasonable effort" to negotiate a collective bargaining agreement.

A. The Railway Labor Act Intended to Substitute Negotiation and Mediation Procedures for Resort to Self-Help.

The Railway Labor Act establishes an elaborate statutory mechanism for resolving disputes in the railway and airline industries without the disruption to commerce caused by a resort to self-help measures by carriers or unions. See *Detroit & Toledo Shore Line*, 396 U.S. at 148; *Texas & New Orleans R.R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930).

In Section 2, Ninth Congress designated the National Mediation Board as the agency with exclusive jurisdiction to resolve disputes over which union shall represent a particular "craft or class" of employees and to "certify" the designated union as the authorized collective bargaining representative.⁶ Section 2, Ninth of the Act mandates that "[u]pon receipt of such certification the carrier shall treat with the representative so certified as the

⁶ The NMB's jurisdiction over representation disputes has long been recognized as exclusive. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

representative of the craft or class." Section 2, First requires the employer to "exert every reasonable effort to make and maintain agreements concerning . . . working conditions" with the employees' certified representative. The plain language of the Act thus makes it clear that the certification of a union by the NMB triggers the substitution of the statutorily prescribed procedures of dispute resolution for the unilateral resort to self-help.

The statutory processes are bolstered by three explicit "status quo" provisions which prohibit unilateral action prior to exhaustion of the procedures of the Act. See Section 5, First; Section 6; and Section 10. In addition, this Court has recognized an implicit status quo requirement in the duty to "exert every reasonable effort" to make agreements imposed by Section 2, First. *Detroit & Toledo Shore Line*, 396 U.S. at 151.

In this case, despite Certification of the IAM as the collective bargaining representative of the passenger service employees, TWA "adamant[ly]" and "audacious[ly]" refused to commence bargaining with the union, and unilaterally changed the working conditions of the passenger service employees (App. 19a-20a).⁷

As the district court recognized, this action of TWA in making "important unilateral changes" in the working conditions of the employees while it "held IAM at bay" flagrantly violated the Act (App. 20a). The court found that its authority to remedy such a violation of the Act, however, is circumscribed by this Court's decision in *Williams v. Jacksonville Terminal Co.* In the district court's view, *Williams* precludes a remedy as long as

⁷ The district court found that TWA took "the adamant position that it will not negotiate with the IAM, unless and until ordered to do so by a court" (App. 19a-20a). The court further found that the carrier did not seek a stay in negotiations but "simply defied the statutory command and took the law into its own hands" (App. 20a). The court characterized TWA's conduct as "remarkably audacious" (App. 20a).

the violations are committed between certification of the union and the consummation of the parties' first collective bargaining agreement. The court of appeals went even further, holding that *Williams* did not merely curtail the court's power to prevent self-help, it virtually eliminated it. Because the court of appeals was bound by the holding in *Williams*, it reached a result at odds with the statutory scheme and subsequent decisions of this Court. Only this Court, by overruling *Williams*, can restore the balance intended by the Act and articulated in *Detroit & Toledo Shore Line*.

B. *Williams* Is Inconsistent With Subsequent Decisions Of This Court And The Policies Of The Act.

Williams v. Jacksonville Terminal Co. turns on two principles that were subsequently rejected by this Court. In *Williams*, the Court held that an employer was permitted, while bargaining with a union, to deal directly with employees and to establish individual contracts of employment with them. This conclusion provided the basis for the second rule of law articulated in *Williams* and relied upon by the court of appeals in this case: that the Railway Labor Act does not preclude an employer from making unilateral changes in working conditions before they are reduced to writing in an agreement. Because neither of these propositions survives today, *Williams* should be overruled.

1. *In Ruling That A Carrier May Deal Directly With Employees Instead of Their Representative, Williams Has Been Superseded.*

Williams held that a carrier may bargain with individual employees represented by a union even though negotiations have been demanded by the union. 315 U.S. at 402. This premise led the Court to the further conclusion that the Act's prohibitions on unilateral changes are confined to conditions expressed in "agreements, reached after collective bargaining" and not to other

working conditions. *Id.* at 400. Consequently, the status quo provisions are inoperative until a contract has been negotiated.

Only two years after *Williams* was decided, this Court rejected the premise on which this reasoning was based. In *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court held that an employer undermined and defeated the purposes of the National Labor Relations Act by dealing directly with individual employees who are represented by a union. As the Court noted, “[t]he very purpose of providing by statute for the collective agreement is to supercede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.” *Id.* at 338. The Court immediately applied the principle of *J.I. Case* to employers covered by the Railway Labor Act. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944). Since 1944, the courts have uniformly held that a carrier may not, consistent with its duty to recognize and bargain with a certified union, carry on direct dealing with individual employees. Such direct dealing undermines the bargaining status of the certified representative. *See, e.g., Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718-20 (7th Cir. 1987); *Musicians Union of Las Vegas v. Del E. Webb Corp.*, 736 F.2d 1388, 1391 (9th Cir. 1984); *see generally Cox, The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958).

2. *The Status Quo Provisions of the Act Apply Immediately After Certification and While the Initial Collective Bargaining Contract Is Being Negotiated.*

Section 2, Seventh of the Act provides that the carrier may not implement unilateral changes in working conditions until the procedures prescribed by Section 6 are

exhausted. In this case, the court of appeals held that the status quo provisions of Section 6 do not apply when the union has been certified and seeks to bargain with the carrier but no agreement has been reached because of the carrier's refusal to bargain. That holding is not only contrary to this Court's decision in *Detroit & Toledo Shore Line*, it seriously undermines the workings and policies of the Railway Labor Act.

The *Detroit and Toledo Shore Line* case arose when the carrier announced a unilateral change in work assignments while the parties were exhausting the Act's mediation procedures. The question presented to the Court was whether unilateral changes in matters not covered by the parties' collective bargaining agreement, like unilateral changes in working conditions fixed by the agreement, were prohibited by Section 6 of the Act. The Court held that the term "agreements" as used in the statute encompasses not merely the provisions reduced to writing in a collective bargaining agreement, but the totality of "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* at 153.⁸

The Court in *Detroit & Toledo Shore Line* took pains to question—although not expressly to overrule—the conclusion in *Williams* that the status quo requirements of Section 6 were applicable only to "changes in agreements." See *id.* at 158. Two years later, as the court of appeals recognized, this Court's decision in *Chicago & North Western Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971), "signaled a further erosion of the *Williams* principle" (App. 10a).

⁸ That holding—that the status quo requirement of Section 6 applies equally to working conditions that are not embodied in a written collective bargaining agreement—has become a central tenet of Railway Labor Act jurisprudence.

In that case, the union had exhausted the Act's procedures for negotiation and mediation and was prepared to use the self-help measure of a strike. The carrier sought an injunction on the basis that Section 2, First required the union to continue to exert every reasonable effort to make an agreement—rather than resorting to self-help—even though it had exhausted the procedures of the Act. This Court agreed that unilateral action could be judicially enjoined to encourage full compliance with the duty to bargain.

As the court of appeals recognized, if the parties' duty to make agreements under Section 2, First prohibits the *union* from resorting to self-help, it also precludes the *carrier* from resorting to self-help. The court of appeals put it succinctly: "It would seem apparent that the power to enjoin the Union's self-help measure—strikes—implies the concomitant power to enjoin management's self-help measure—a potentially strike-provoking unilateral change in work conditions" (App. 11a). Yet the court of appeals inexplicably declined to apply this principle to enjoin TWA's self-help.

Detroit & Toledo Shore Line clearly holds that the Act's status quo provisions apply to working conditions not embodied in the parties' written agreement. And *Chicago & North Western* clearly holds that the Act's status quo provisions apply even after the parties have exhausted the procedures of the Act. As this case demonstrates, there is pressing need for this Court to clarify that under the Railway Labor Act, unilateral changes made after a bargaining representative is certified by the NMB but before an initial contract is negotiated can be permitted only at the expense of the bargaining process.⁹ To do so, this Court must expressly overrule *Williams*.

⁹ It has long been recognized under the National Labor Relations Act that unilateral changes by an employer who is under the duty to negotiate violates the duty to bargain as "much as does a flat refusal [to negotiate]." *NLRB v. Katz*, 369 U.S. 736, 743 (1962);

C. In Failing To Uphold The Status Quo Injunction Issued Under Section 2, First, the Court of Appeals Misconstrued the Statutory Scheme and Sanctioned Unilateral Actions During Exhaustion of the Act's Procedures.

In *Detroit & Toledo Shore Line*, this Court established that Section 2, First creates an implicit status quo requirement precluding self-help while the parties comply with their duty "to exert every reasonable effort" to settle disputes without disruption to commerce. 396 U.S. at 151. The court of appeals, however, disregarded the teaching of *Detroit & Toledo Shore Line* and misconstrued the statutory scheme by concluding that unilateral changes prohibited by Section 2, First cannot be enjoined until the parties exhaust the procedures of the Act.

The ruling in this case puts the cart directly in front of the horse. Whereas the status quo provisions of the Act are intended to serve as an aid to the orderly utilization of the Act's processes, the court of appeals makes exhaustion of the Act a prerequisite to invocation of the status quo provisions.¹⁰ Contrary to the reasoning of the court of appeals, the status quo provisions of Section 2, First are not a parenthetical afterthought; they are "central to [the Act's] design." *Detroit & Toledo Shore*

see also NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965) (NLRA violated when employer made unilateral wage changes after union was certified).

¹⁰ The court of appeals apparently rested its ruling on the fact that in *Chicago & North Western* the union had exhausted the procedures of the Act at the time it prepared to strike. However, *Chicago & North Western* in no way suggests that exhaustion of the Act's procedures is a prerequisite to obtaining injunctive relief against self-help. *Chicago & North Western* merely represents one occasion where a party was precluded from resorting to self-help so that it would continue to exert efforts to reach an agreement. Indeed, *Chicago & North Western* reflects the notion that unless the avenue to self-help is closed, the parties will lack the incentive to follow the course charted by the statute.

Line, 396 U.S. at 150. They are especially critical when parties are undertaking to negotiate working conditions.

"[T]he problem of strikes", the Court said, is "particularly acute in the area of 'major disputes,' those disputes involving the *formation* of collective agreements and efforts to change them." *Id.* at 148 (citations omitted) (emphasis added). Referring specifically to Section 2, First, the Court stated that "[the Act] imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted." *Id.* at 149. As the Court noted, "delaying the time when the parties can resort to self-help . . . helps create an atmosphere in which rational bargaining can occur." *Id.* at 150.

A status quo requirement attendant on the duty to bargain precludes premature and self-serving resort to self-help and makes possible "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period." *Id.* at 152.¹¹ In contrast, without a status quo requirement, the carrier can simultaneously bargain and make unilateral changes. And because the union cannot be expected to "sit idly by as the [carrier] rush[es] to accomplish the very result the union [is] seeking to prohibit by agreement," *Detroit & Toledo Shore Line*, 396 at 154, the Act's primary purpose of avoiding interruptions to commerce is thereby defeated.

The court of appeals fatally misconstrued the status quo provision of Section 2, First by ruling that it could

¹¹ Although the Court's conclusion that a status quo requirement is necessarily implicit in Section 2, First is based primarily on the "overall design and purpose of the Railway Labor Act," 396 U.S. at 148, the Court also found support in the legislative history of the Act. See *id.* at 151, n.18 (legislative history indicates that status quo was to be maintained "from the time that a dispute is engendered").

not be enforced until *after* the party seeking an injunction against self-help had exhausted the procedures of the Act instead of recognizing that a status quo requirement comes into play "*while* the Act's remedies [are] being exhausted." 396 U.S. at 149 (footnote omitted) (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to reconsider and overrule explicitly the case of *Williams v. Jacksonville Terminal Co.* on the basis that its reasoning has been discarded by subsequent decisions of this Court but its holding continues to compel the result reached in this case.

The writ should also be granted to allow this Court to reverse the decision of the court of appeals and enforce the status quo provision of Section 2, First of the Railway Labor Act.

Respectfully submitted,

Of Counsel:

JOSEPH P. MANNERS
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOSEPH GUERRIERI, JR.
(Counsel of Record)
JOHN A. EDMOND
MARTHA WALFOORT
GUERRIERI, EDMOND & JAMES
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 296-7002

Attorneys for Petitioner

June 17, 1988

APPENDICES

VERBODEN

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 87-5092

INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC.,
Appellant

No. 87-5093

TRANS WORLD AIRLINES, INC.,
Appellant

DEBORAH K. BOLLER, *et al.*

v.

NATIONAL MEDIATION BOARD, *et al.*

No. 87-5176

TRANS WORLD AIRLINES, INC.,
Appellant

DEBORAH K. BOLLER, *et al.*

v.

NATIONAL MEDIATION BOARD, *et al.*

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 86-01912 and 86-02980)

Argued January 7, 1988

Decided February 19, 1988

Eric Rosenfeld for appellant Trans World Airlines. *Deborah A. Folloni* and *Ronald A. Lindsay* entered appearances for appellant Trans World Airlines.

Michael E. Avakian for appellants *Deborah K. Boller*, et al.

Mark W. Pennak, Attorney, Department of Justice, with whom, *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, *Ronald M. Etters*, General Counsel, National Mediation Board and *John F. Cordes*, Attorney, Department of Justice were on the brief, for appellees National Mediation Board. *William Kanter*, Attorney, Department of Justice, also entered an appearance for appellee National Mediation Board.

John A. Edmond, with whom *Joseph Guerrieri, Jr.*, was on the brief, for appellee International Association of Machinists and Aerospace Workers.

Before RUTH B. GINSBURG, WILLIAMS, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge SENTELLE*.

SENTELLE, *Circuit Judge*: These three consolidated appeals concern union representation of passenger service employees of Trans World Airlines, Inc. (TWA). In the District Court, TWA and the individual plaintiffs sought to set aside the National Mediation Board (NMB) certification of the International Association of Machinists and Aerospace Workers (IAM) as bargaining representative. IAM sought an order requiring TWA to commence bargaining and enjoining TWA from altering wages, rules and working conditions, and to retroactively restore conditions to those that existed on May 23, 1986 (the date on which IAM was certified as the bargaining

representative for the passenger service employees). The District Court held that the certification of IAM as the bargaining representative was unreviewable pursuant to *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). The District Court then ordered TWA to commence bargaining and enjoined *prospective*, unilateral changes in working conditions. TWA appeals both the certification and the injunction against prospective unilateral changes. As to the first of those questions, we find no error and affirm. As to the second, we reverse.

I.

The threshold question is whether this Court should reverse the District Court and vacate the NMB certification of IAM as the representative of TWA's passenger service employees. If we answer this issue in favor of TWA and against IAM, the injunction becomes void. TWA's attack on the certification is grounded on the NMB's decision to exclude from the representation election TWA passenger service employees serving as temporary flight attendants while regular flight attendants were on strike. The relevant facts are set out in detail in the District Court's opinion, *International Association of Machinists v. TWA, Inc.*, 654 F. Supp. 447 (D.D.C. 1987), and we will repeat only those necessary to an understanding of this decision.

The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted the volunteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status, and seniority. Nonetheless, since the employees were actually working in "another

craft or class" on the date of the election, the NMB declared them ineligible, purportedly on the basis of its prior decision in *Trans World Airways, Inc.*, 8 N.M.B. 663 (1981). In that opinion, the employees in question, rather than being on temporary assignment, were actually on permanent assignments but sought eligibility to vote in prior positions as to which they retained "recall" rights. The affected employees in the case before us, together with TWA, suggest that the prior NMB decision is plainly distinguishable since the employees in the prior case had a "present interest in their present craft or class" not paralleled by the concededly temporary flight service attendants who desired to vote in the craft or class of their regular employment. TWA and the individual plaintiffs contend that this resulted in unfairness and was not supported by the evidence before the Board.

The election was in fact a very close one. Certification would be granted only if a majority of eligible voters cast ballots in favor of representation. The decertification decision, with reference to the individual plaintiffs and others of their class, was made after all ballots had been received. 1,279 eligible voters cast ballots for IAM, 935 for International Brotherhood of Teamsters, and 36 for the IFFA. Thus, 2,250 valid ballots were cast in favor of representation. The total number of valid ballots was 4,308 so that 51.96% voted in favor of representation. Had the 302 questioned employees been eligible, the 2,250 votes cast would have amounted to only 48.88%, and certification would not have been in order. It was on this basis that TWA and the individual plaintiffs prayed the District Court to void the certification.

They argue that under the Board's own representation manual, revised edition effective on November 1, 1985, temporary employees of the sort represented by plaintiffs here should have been counted in their regular craft. Section 5.302 of that manual reads:

Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation. (Emphasis supplied).

Plaintiffs contend that under no reasonable construction of "regularly" can these employees be found ineligible. Certainly, their argument is an appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed. Judicial review of NMB decisions is one of the narrowest known to the law. As the District Court noted, "It has been established for over twenty years that courts have no authority to review NMB certification decisions in the absence of the showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee, or Union." 654 F. Supp. at 450. Citing *Brotherhood of Railway and S.S. Clerks v. Association for the Benefit of Noncontract Employees*, 380 U.S. 650, 658-660, 661-62 (1965); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303 (1943), *inter alia*.

In the instant case, plaintiffs contend that the pleadings reflect such a gross violation of the statute in that the Board's decision to decertify the decisive block of eligible voters on so tenuous a basis after the cut-off of eligibility date and the receipt of all ballots violates a statutory duty of neutrality. However, there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty.¹

¹ The use of the word "neutral" in the statute occurs in fact at 45 U.S.C. § 152, Ninth, "in the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three *neutral* persons who after hearing shall within 10 days designate the employees

And the "peek at the merits" permitted to this Court when reviewing NMB decisions, *IBT v. BRAC*, 402 F.2d 196, 205 (D.C. Cir. 1968), *cert. denied sub nom. BRAC v. NMB*, 393 U.S. 848 (1968), does not disclose a "gross violation of the statute."

Similarly unavailing is plaintiffs' argument that the Board's disenfranchisement of the temporary flight attendants constitutes a violation of constitutional rights. The disenfranchised voters and TWA claim that the voters' "right of association" was violated by NMB's decertifying them, which they contend was for associating with TWA. They offered the District Court no authority for this proposition, nor have they offered any here, nor indeed have we independently found any such authority. While the treatment of these employees certainly does not cast the NMB in a very favorable light, that treatment does not reach the level of violating a constitutional right, and we are constrained to hold, for the reasons stated by the District Court, that plaintiffs have failed to demonstrate either a gross violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*,² or any violation of the Constitution. Therefore, under the principles set forth in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the certification of the IAM as bargaining representative is not reviewable.

II.

TWA's challenge to the District Court injunction against unilateral change of working conditions is more troublesome. After certification, TWA refused to treat with the newly certified representative pending reso-

who may participate in the election." (Emphasis supplied). The word neutral does not occur as an adjective modifying the Board itself.

² The provisions of the Railway Labor Act, except 45 U.S.C. § 153, are applicable to airlines. 45 U.S.C. § 181.

lution of litigation over the validity of the certification and made unilateral changes in working conditions, specifically by giving flight attendants a role in passenger pre-boarding—"a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place." 654 F. Supp. at 452. IAM prayed the District Court to order TWA to bargain in good faith, which the District Court did; to roll back the unilateral change in working conditions, which the District Court refused; and to enjoin TWA from making further unilateral changes in working conditions pending the entry of a collective bargaining agreement.³ In considering the third section of IAM's prayer for injunctive relief, the District Court weighed relevant authorities to determine that TWA's refusal "to negotiate with the IAM over the wages, rules, and working conditions of its passenger service employees despite . . . certification by the National Mediation Board," was a violation of "Section 2, First, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth, and Ninth." 654 F. Supp. at 456. The District Court then ordered that TWA "be enjoined from making any further unilateral changes in the wages, rules, and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act. 45 U.S.C. § 156." *Id.* at 456. In so doing, the District Court overstepped its statutory authority.

As the District Court noted, paragraph Seventh of 45 U.S.C. § 152⁴ provides that:

³ The first two rulings in the District Court's injunction are not under attack here and are in accordance with fixed principles of railway labor law. *See generally* 45 U.S.C. § 152 and authorities collected in *International Association of Machinists & Aerospace Workers v. Trans World Airlines, Inc.*, 654 F. Supp. 447 (D.D.C. 1987).

⁴ This section is also referred to hereinafter as "Section 2."

No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156. . . .

The referenced section suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156.⁵ However, as the District Court also noted, the Supreme Court in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), held that the injunctive power granted by Section 6 for the preservation of the status quo is limited by the terms of the Act to those situations in which the status quo reflects a pre-existing collective bargaining agreement. The *Williams* case, like the case at bar, involved an attempt by the Union to enjoin changes in working conditions when no collective bargaining agreement was in place. That opinion expressly holds:

The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.

Id. at 403. The District Court recognized this limitation from *Williams* but noted that later Supreme Court cases evidence an erosion in the principle set forth in that case.

In *Detroit and Toledo Shoreline R.R. v. United Transportation Union*, 396 U.S. 142 (1969), the Supreme Court considered a case in which a previous collective bargain-

⁵ This section is also referred to hereinafter as "Section 6."

ing agreement was in place but management made unilateral changes in working conditions as to subjects not expressly covered in that agreement. Justice Black, writing for the Court, noted that “[t]he Railway Labor Act was passed . . . to encourage collective bargaining by [carriers] and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.” *Id.* at 148 (footnote omitted). He further noted that the status quo provisions of the Act were central to its design and that Sections 5, 6, and 10 “together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute⁶ through the final 30-day ‘cooling off’ period.” *Id.* at 152. The Court then held that “the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement.” *Id.* at 153. The Court then distinguished the *Williams* decision as being one in which there was no pre-existing collective bargaining agreement while the *Detroit and Toledo* situation presented an existing agreement which did not cover the specific working conditions subjected to the unilateral change. At this point, the Court described *Williams* in language that indicated erosion of the precedential force of that decision:

In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the . . . Railway Labor Act claim [in *Williams*] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied. . . .

⁶ The *Detroit and Toledo* case defines “‘a major dispute’ [as] one arising out of the *formation* or change of collective agreements covering rates of pay, rules, or working conditions.” *Id.* at 145 n.7 (emphasis supplied) (citations omitted).

Id. at 158. As the District Court notes, this certainly casts some doubt on the continuing willingness of the Supreme Court to follow the *Williams* precedent in a case not factually distinguishable from it. However, *Detroit and Toledo* plainly stops short of overruling *Williams* and leaves it binding in a case like the one before us where there has been "absolutely no prior history of any collective bargaining or agreement between the parties on any matter." *Id.*

Since the *Detroit and Toledo* opinion, the Supreme Court has signaled a further erosion of the *Williams* principle in *Chicago and Northwestern R.R. v. United Transportation Union*, 402 U.S. 570 (1970). In that case there had been a prior collective bargaining agreement but that agreement had expired and the mediation process was complete. Therefore, like the case at bar, there was no immediately enforceable collective bargaining agreement on any subject. The Union prepared to strike. Management sought to enjoin the Union. Thus, as in the case at bar, one party to the negotiation sought to judicially prevent the other from invoking self-help. The Supreme Court found the substance of the complaint before it to be the Union's alleged failure to perform its obligations under Section 2, First, which imposes upon management and labor the duty "to exert every reasonable effort to *make* and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ." 45 U.S.C. § 152, First (emphasis supplied). The Court, after weighing the legislative history, determined that Section 2, First, imposed a legal duty upon the parties independent of the duties under Section 6, holding:

[W]e think it plain that § 2 First, was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

Id. at 577. And, the Court further held that these “appropriate means” could include injunction against a strike. It would seem apparent that the power to enjoin the Union’s self-help measure—strikes—implies the concomitant power to enjoin management’s self-help measure—a potentially strike-provoking unilateral change in work conditions. This seems particularly true when in each instance the power is aimed at enforcing the same duty arising out of Section 2, First, as quoted above and furthering the congressional goal of maintaining uninterrupted interstate commerce as described by Justice Black.

Therefore, while the legal foundation of the District Court’s power to issue an injunction like the one issued here does exist, nonetheless, the *Williams* case holding, though weakened, is not dead. None of the Supreme Court cases cited above and no other case, before or since, has overruled *Williams*. Thus, no power to enjoin unilateral changes in working conditions by management flows from Section 6 of the Act in the absence of pre-existing, in place, collective bargaining agreements. The independent duty found by the Court under Section 2, First, in the *Chicago and Northwestern* case is a limited one. The Court expressly held that the injunctive remedy would be available only “where a strike injunction is the only practical, effective means of enforcing the command of § 2 First.” 402 U.S. at 582. Plainly the same restrictive test should apply in enjoining self-help by management. In *Burlington Northern R.R. v. BMW*, — U.S. —, 107 S. Ct. 1841 (1987), the Supreme Court underscored the limited circumstances under which this drastic remedy is available stating “[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff’s right.” *Id.* at —, 107 S. Ct. at 1851 (quoting *International Assn. of Machinists v. Street*, 367 U.S. 740, 773 (1961)).⁷

⁷ *Burlington Northern R.R. v. BMW* is also one of a long line of cases making plain that the anti-injunction provisions of

While the District Court's opinion in the case before us does quote the limiting language from *Chicago and Northwestern R.R.* to the effect that the injunction is "the only practical, effective means" of enforcing a duty imposed by the Railway Labor Act, in this case that finding is not at this time, supported by the record. In *Chicago and Northwestern*, all the procedures for negotiations, mediation, and "cooling off" period had been attempted before resort to the injunctive measure. Here, the first steps had not yet been taken when the final leap occurred. Therefore, we are constrained to conclude that so long as *Williams* remains the law, the District Court lacks the power to employ this drastic measure, absent a showing of unavailability or ineffectiveness of other remedies. Thus, as to this assignment of error and this one only, we reverse the decision of the trial court, while affirming that decision in all other particulars. In short, the order of the District Court is affirmed in part, and reversed in part.

the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, do not prevent the strike injunctions, above discussed, in appropriate limited circumstances. See, e.g., *Chicago and Northwestern R.R. v. Transportation Union*, *supra* at 581, and authorities collected therein.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 86-1912

INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC.

Civ. A. No. 86-2980

TRANS WORLD AIRLINES, INC., *et al*

v.

NATIONAL MEDIATION BOARD,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

MEMORANDUM

These two consolidated cases concern union representation of the passenger service employees of Trans World Airlines, Inc. ("TWA"). In Civil Action No. 86-1912, the International Association of Machinists and Aerospace Workers ("IAM") seeks an order requiring TWA to commence bargaining over the wages, rules, and working conditions of the TWA passenger service employees

and enjoining TWA from altering the wages, rules, and working conditions that obtained on May 23, 1986. On that date the National Mediation Board ("NMB") certified the IAM as the bargaining representative for TWA's passenger service employees. In Civil Action No. 86-2960, which was originally filed in the United States District Court for the Southern District of Texas, the plaintiffs, including TWA and several individual passenger service employees, seek to set aside the NMB certification. That suit was transferred to this Court from the Texas Court on August 29, 1986.¹

I.

The sole issue in Civil Action No. 86-2980 and a threshold question in Civil Action No. 86-1912 is whether this Court should vacate the NMB certification of the IAM as the representative of the TWA passenger service employees. The focus of this issue is the NMB decision to exclude from the representation election TWA passenger service employees who were serving as flight attendants at the time of the election while the regular flight attendants participated in a strike called by the Independent Federation of Flight Attendants ("IFFA").

By a telegram dated February 12, 1986, the NMB authorized a mail ballot election of TWA's passenger service employees. Three unions participated in the election, the IAM, the IFFA and the International Brotherhood of Teamsters ("Teamsters"). The NMB mailed its ballots on March 28, 1986, and scheduled the vote count for April 28, 1986. *Trans World Airlines, Inc.*, 13 NMB 210 (1986). On April 22, 1986, the Teamsters requested that the voting period be extended for two weeks unless the Board deleted from the eligibility lists former pas-

¹ Civil Action No. 86-2960 was originally two separate suits, *Boller v. NMB*, (C.A. No. H-86-2348) and *TWA v. NMB*, (C.A. No. H-86-2350). These cases were consolidated by Judge Gabrielle K. McDonald in her order transferring them to this Court.

senger service employees who were then employed during an IFFA strike as TWA flight attendants. Representatives of all three unions and TWA met with NMB mediator Joseph Anderson on April 25, 1986, to review the list of eligible voters. A further meeting was held on April 28, 1986. On that date, Mediator Anderson determined that employees working as strike replacements for TWA flight attendants were eligible voters in the passenger service employees' representation election. The Teamsters appealed this determination and the ballots were impounded pending the resolution of the appeal. The Board issued its written decision on May 13, 1986, holding that employees who were working as "contingent flight attendants" were ineligible to vote within the craft or class of passenger service employees. *See Trans World Airlines, Inc.*, 13 NMB 210, 216 (1986). A May 14, 1986 motion for reconsideration of this decision filed by TWA was denied by the Board on May 15, 1986. The next day, the Board counted the mail ballots and on May 23, 1986, it announced that a majority of eligible voters had voted for a union and that the IAM had received a majority of the pro-union votes.² 13 NMB 237 (1986). Accordingly, the Board certified the IAM as the authorized representative of the passenger service employees. *Id.* at 238.

It has been established for over 20 years that courts have no authority to review NMB certification decisions in the absence of a showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee or union. *Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658-60, 661-2 (1965) ("*Railway Clerks*"); *Switchmen's Union of*

² Of 4330 eligible employees, 1279 cast votes for the IAM, 935 cast votes for the Teamsters and 36 cast votes for the IFFA. *See* 13 NMB 237, 238 (1986).

North America v. National Mediation Board, 320 U.S. 297, 303 (1943) (“Switchmen’s Union”); *International Association of Machinists and Aerospace Workers v. National Mediation Board*, 425 F.2d 527, 536 (D.C. Cir. 1970); *International Brotherhood of Teamsters v. Brotherhood of Ry. Airline and S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.) *cert. denied*, 393 U.S. 848 (1968) (“*IBT v. BRAC*”).

Despite the assiduous efforts of their counsel, plaintiffs have failed to demonstrate either a gross violation of the Act or any violation of the Constitution. Plaintiffs’ attempts to characterize this case as one where the NMB has failed to perform its statutory duty to “investigate” a representation dispute are not persuasive. See Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. For example, TWA purports to find a violation of this statutory obligation to “investigate” in its discovery that some documents which it believes should be in the NMB’s file are not there. In addition, the plaintiffs allege that the NMB’s determination regarding the contingent flight attendants was erroneous and that the NMB therefore could not have “investigated” the dispute.

There is authority for judicial intervention where the NMB certified a union solely on the basis of signature cards authorizing an election and then refused to investigate the ensuing dispute, *International In-Flight Catering Co. v. National Mediation Board*, 555 F.2d 712, 718 (9th Cir. 1977), and where the NMB refused to investigate an individual’s application to represent some fellow employees, *Russell v. National Mediation Board*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). Here, it is undisputed that NMB investigated the representation dispute among TWA’s passenger service employees and conducted a mail ballot election. Moreover, the Board also “investigated” the eligibility dispute and issued a written opinion which was based on NMB precedent. See *Chicago and North Western Ry. Company*,

4 NMB 240 (1965) ; *Trans World Airways, Inc.*, 8 NMB 663 (1981). TWA can not therefore evade the strictures against judicial review of NMB certification decisions by characterizing its complaint about the substance of the Board's decision as a "failure to investigate" claim.

The claims of the individual plaintiffs are no more substantial than those of TWA. These plaintiffs were passenger service employees who responded to TWA's call for volunteers while the permanent flight attendants were on strike and who were still serving as flight attendants when this disputed election occurred. The NMB decision to treat the contingent flight attendants as flight attendants rather than as passenger service employees simply does not inflict injury of a gross or constitutional dimension. Nor is there any merit in these plaintiffs' assumption that they would have been ineligible to vote as flight attendants where, as here, the NMB never precluded such participation, and there is no showing that the plaintiffs endeavored to participate in Independent Federation of Flight Attendant affairs. The foregoing disposes of any glimmering claim of plaintiffs that the NMB impaired their First Amendment associational rights. TWA invited the individual plaintiffs to serve as flight attendants and they voluntarily accepted. NMB had no role in the individual plaintiffs serving as flight attendants so that there is no basis for a contention that NMB has any responsibility for plaintiffs being flight attendants at the time of this election for passenger service employees. Nor did the NMB interfere with plaintiffs' associational rights when it determined that plaintiffs' voting rights followed their voluntary change in jobs.

Both TWA and the individual plaintiffs allege that the NMB acted on the basis of an impermissible pro-union bias when it made its decision regarding the contingent flight attendants.³ It is unclear whether a proven instance

³ In particular, TWA alleges that on April 28, 1986, the date the ballots were impounded pending decision on the Teamster's

of "non-neutrality" would constitute a gross violation of a specific provision of the Railway Labor Act or would be sufficient to transform a disagreement about a Board decision into a constitutional claim. There is no occasion to decide that question, however, because the plaintiffs have failed to proffer any substantial evidence to support this claim. In the absence of such a proffer, they have not demonstrated an error that is "obvious on the face of the papers." See *IBT v. BRAC*, 402 F.2d at 205. Permitting extensive discovery, such as that requested by these plaintiffs,⁴ whenever a party alleges a lack of "neutrality" would contradict the Supreme Court's admonition that "the dispute [is] to reach its last terminal point when an administrative finding is made." *Switchmen's Union*, 320 U.S. at 305. An accompanying order will therefore grant the NMB and IAM motions for summary judgment dismissing the plaintiffs' challenges to the May 23, 1986 Certification.

appeal, "it was apparent from the ballot impounding procedure that approximately 2300 ballots had been cast—a number either close to or just shy of the number of ballots necessary for certification of a representative." See TWA's Memorandum in Response to NMB's and IAM's Rule 12(b)(6) and Rule 56 Motions for Summary Judgment and NMB's Rule 12(b)(1) Motion to Dismiss at 6. In addition, TWA has alleged that the "NMB and all parties to [the case] were aware that declaring the contingent flight attendants ineligible to vote would reduce the number of potential eligible voters and thereby increase the chances for a Union victory." See *id.* at 6-7. This assertion is difficult to square with the undisputed fact that two of the unions, the IAM and the IFFA, supported the mediator's determination that the contingent flight attendants were eligible to vote. See also Individual Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 2.

⁴ On July 14, 1986, TWA served the NMB and the Teamsters with interrogatories and document requests. In addition, the individual plaintiffs noticed the deposition of Mediator Anderson on October 29, 1986. A November 18, 1986 protective order stayed discovery pending resolution of the dispositive motions filed by the NMB and the IAM. That order is mooted by the resolution of these motions.

II.

In Civil Action No. 86-1912, IAM seeks judicial enforcement of legal rights it claims to have been created in it by virtue of its May 23, 1986 certification. Specifically, IAM seeks an order compelling TWA to "treat" with it as bargaining representative of the TWA service employees as required by section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and an injunction against any changes in TWA's working rules for these employees which have been effected by TWA since the May 23 certification.

The IAM claim that TWA should have been treating or negotiating with respect to the service employees is firmly grounded in the governing statute. Paragraph Ninth of 45 U.S.C. § 152 provides without equivocation that

Upon receipt of [a] certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.^[5]

Despite the clear command of this statute and the clearly expressed congressional intention to limit the role of the judiciary in its administration, TWA has taken the ada-

⁵ This refusal to negotiate following certification is not only a clear violation of Section 2, Ninth of the Railway Labor Act; it is also contrary to Section 2, First of the Act which provides, in part, that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" 45 U.S.C. § 152, First. Furthermore, there is a strong argument that this conduct is in violation of Section 2, Fourth, which guarantees that "[n]o carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees" 45 U.S.C. § 152, Fourth.

mant position that it will not negotiate with the IAM, unless and until ordered to do so by a court. An accompanying order will accommodate that demand. While TWA challenged the certification in Texas, it never asked the Texas Court, this Court or any court for leave to delay negotiations. It simply defied the statutory command and took the law into its own hands. In fact, in a remarkably audacious response to an IAM request to begin negotiations, TWA replied:

In view of the pending proceedings [in Texas] and in order to preserve our full rights to judicial review, it would be inappropriate and, indeed, that (sic) *it may be unlawful*, for TWA to commence bargaining or otherwise deal with the IAM as the representative of the passenger service employees at this time when its representation status is in question. Therefore we intend not to do so until this matter is finally resolved.

Exhibit C to the IAM's Statement of Material Facts as to Which There is no Genuine Dispute at 2 (emphasis added).⁶

While TWA held IAM at bay with its refusal to deal thereby precluding the formation of a collective bargaining agreement with respect to the TWA passenger service employees,⁷ it made important unilateral changes in the working conditions of the IAM represented service employees. Specifically, TWA gave flight attendants a role in passenger pre-boarding, a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place. TWA's ability to proceed unilaterally was enhanced by the delay in the decision of the Texas

⁶ At oral argument, TWA's counsel was unable to supply any authority for this flat contradiction of the language of the statute.

⁷ IAM and TWA have for many years had a collective bargaining agreement with respect to thousands of other TWA employees.

Court to transfer the certification case to this Court, and by a frivolous appeal of that transfer order filed by the individual plaintiffs. Under these circumstances, this Court was reluctant to act on IAM's prayer for interlocutory relief while responsibility for the certification case was in limbo. In retrospect, IAM had established its entitlement to an order compelling negotiation as of July 8, 1986, when it applied for a temporary restraining order. Whether this situation can be rectified remains to be seen. It is clear that an order compelling TWA to negotiate with the union in good faith should be entered now. See *Virginian R.R. Co. v. System Fed. No. 40*, 300 U.S. 515, 544-45, (1937); *Railway Clerks*, 380 U.S. at 658; *Aeronautical Radio, Inc. v. National Mediation Board*, 380 F.2d 624, 627 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967).

III.

IAM's prayer for a further order re-establishing working conditions as they existed on May 23, 1986, when it was certified poses a more difficult question. Paragraph Seventh of 45 U.S.C. § 152 provides that:

No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156

Section 156 suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156. In *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 400-03 (1942), the Supreme Court limited judicial authority to preserve working conditions in *status quo* under section 156 to conditions embodied in pre-existing collective bargaining agreements. The potential scope of the holding in *Williams* was substantially narrowed in the later case of *Detroit & Toledo Shore Line R.R. Co. v. United*

Transp. Union, 396 U.S. 142 (1969), in which the Court held that the “status quo extends to those actual objective working conditions out of which the dispute arose” and that “these conditions need not be covered in an existing agreement.” *Id.* at 153-54. The *Detroit & Toledo Shore Line* Court therefore required that an employer comply with the status quo requirements of Section 156 during a dispute over a condition of employment that was not covered in its existing collective bargaining agreement with the union. In reaching this conclusion, the Court noted that “[t]he Act’s status quo requirement is central to its design.” *Id.* at 150.

The philosophy of *Detroit & Toledo Shore Line* is clearly at odds with the reasoning in *Williams*. However, the *Detroit & Toledo Shore Line* Court did not “paus[e] to comment upon the present validity” of *Williams* and distinguished that case on the grounds that there was “absolutely no prior history of any collective bargaining or agreement between the parties on any matter.” *Id.* at 303. *Williams* therefore precludes the relief sought by IAM with respect to changes in working conditions heretofore effected.

The Court has considered whether it is authorized, despite *Williams*, to enjoin *future* changes in the status quo, now that TWA is firmly obligated to commence bargaining with the IAM.⁸ In this case, unlike *Williams*,⁹ it is established and the Court has found that TWA’s failure to commence negotiations on or about May 23, 1986, when

⁸ It is undisputed that such changes are planned by TWA. For example, TWA has issued a memorandum notifying all personnel that the position of “reservation agent-in-charge” is being eliminated. See Exhibit A to the Declaration of Timothy Connally (attached to the IAM’s Reply Memorandum). These employees are within the passenger service craft or class.

⁹ In *Williams*, the union and the employer successfully negotiated a collective bargaining agreement after the union’s request for negotiations. See 315 U.S. at 402.

the NMB certified the IAM, is a clear violation of the law. If TWA had complied with its statutory obligation to treat with the IAM in a reasonable time after certification, the collective bargaining waiting period and mediation process created by the statute would have been well advanced, if not completed, by now. These circumstances require an order barring any further changes in wages, rules and working conditions outside the collective bargaining/mediation process prescribed in the Railway Labor Act's *status quo* provisions. This result is thoroughly consistent with *Williams* as illuminated by *Detroit & Toledo Shore Line*. The injunction requiring negotiations will emphasize the good faith obligation imposed by Paragraph Seventh of 45 U.S.C. § 152 by barring further unilateral changes in working conditions and other interference with the IAM's performance of its representation responsibilities.

Finally, the Court must consider whether its authority to issue such relief is barred or constrained by the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* Section 4 of that Act provides that certain actions arising out of labor disputes shall not be subject to injunction. TWA's attempt to characterize its unilateral changes in working conditions as one of these unenjoinable acts is unsupported by citations to case law and is utterly unconvincing.¹⁰ Moreover, it has long been estab-

¹⁰ For example, TWA asserts that it is protected from a status quo injunction by 29 U.S.C. § 104(d) which forbids an injunction prohibiting any person from "aiding any person participating or interested in any labor disputes, who . . . is prosecuting . . . any action or suit in any court of the United States." See TWA's Memorandum in Opposition to the IAM's Motion for Summary Judgment Ordering TWA to Restore and Maintain "Status Quo" at 30. TWA claims that an order requiring it to maintain current working conditions would somehow prohibit it from aiding the individual plaintiffs in this lawsuit. *Id.* It is unclear how TWA believes that altering the current working conditions "aids" these passenger service employees unless it is by weakening the authority of the union.

lished that the requirements of the Norris-LaGuardia Act must be accommodated to the specific provisions of the Railway Labor Act, see *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 40-42 (1957), and that the judiciary is empowered to issue an injunction when it is "the only practical, effective means" of enforcing a duty imposed by the Railway Labor Act. *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 (1971). In this case, it is undisputed that TWA has consistently refused to bargain with the certified representative of its passenger service employees. Indeed, it has taken the untenable position that it would be unlawful to bargain before judicial review of the certification has run its course, presumably through this Court, the Court of Appeals and the certiorari process of the Supreme Court. TWA has thereby extended the power to alter working conditions under *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), well beyond the time contemplated by any plausible interpretation of the Railway Labor Act. An injunction requiring TWA to commence bargaining and prohibiting any further unilateral changes is therefore the only "practical, effective means" of protecting the employees' rights to organize and bargain collectively under the Act and such an injunction may therefore be issued despite the anti-injunction provisions of the Norris-LaGuardia Act.

TWA argues in the alternative that this Court must follow certain procedural requirements of the Norris-LaGuardia Act before issuing any injunctive relief. They invoke section 7 of that Act which provides, in part, that

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a com-

plaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

29 U.S.C. § 107. TWA argues that this provision requires this Court to hold an evidentiary hearing before issuing any injunctive relief. At that hearing, it could be anticipated that TWA would offer testimony on the issues of fact specified by the Norris-LaGuardia Act, namely, whether this action threatens substantial and irreparable injury to [IAM's] "property" and whether the injury to TWA posed by such an injunction is greater than the injury that will be inflicted on the IAM if relief is denied. *See* TWA's Rule 108(h) Statement of Material Facts Facts Necessary to be Litigated at 13.

TWA has cited no case holding that this Court is required to hold such a hearing or make these findings before ordering an employer to perform the duties prescribed in the Railway Labor Act. Indeed, such a decision would violate the principle, firmly established by the Supreme Court, that the explicit provisions of the Railway

Labor Act take precedence over the commands of the Norris-LaGuardia Act. This rule of interpretation does not apply exclusively to the prohibition of injunctions contained in Norris-LaGuardia Act Section 4. In *Virginian R. R. Co. v. System Fed. No. 40*, 300 U.S. 515, (1937), for example, an employer challenged a trial court order requiring it to treat with a union certified pursuant to the Railway Labor Act on the ground that the order did not comply with section 9 of the Norris-LaGuardia Act.¹¹ The Supreme Court held that

The evident purpose of [section 9], as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, section 2 (29 U.S.C.A. § 102), that the employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

¹¹ That section provides, in part, that

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

300 U.S. at 563. *Virginian Railroad Co.* therefore requires that the procedural provisions of the Norris-LaGuardia Act be read in light of that Act's stated policies and that these provisions can not be construed to conflict with the relief authorized under the Railway Labor Act. In this case, no valid purpose would be served by holding the evidentiary hearing contemplated in section 7 of the Norris-LaGuardia Act. The facts central to this Court's ruling, i.e., that TWA has refused to negotiate with the certified representative of its employees and has altered the terms and conditions of employment, are not in dispute. Moreover, the required findings of fact contained in section 7 are simply inapplicable in this case where a union seeks to compel an employer to comply with the commands of the Railway Labor Act. The Norris-LaGuardia Act's policy of protecting the rights of "the individual, unorganized worker" to "full freedom of association, self-organization, and designation of representatives of his own choosing to *negotiate the terms and conditions of his employment*" (emphasis added) would be ill served by further postponing the resolution of this matter in order to hold a time-consuming evidentiary hearing. 29 U.S.C. § 102. Moreover, it is inconceivable that Congress intended to permit a union to enforce the rights explicitly granted to it under the Railway Labor Act only upon a showing that denial of enforcement would result in "irreparable harm" to the union's "property." For these reasons, TWA's contention that the provision of section 7 of the Norris-LaGuardia Act must be satisfied in this case must be rejected. *Accord Brotherhood of R.R. Carmen of America, Local No. 429 v. Chicago & North Western Ry. Co.* 354 F.2d 786, 796 (8th Cir. 1965); *Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 544 F. Supp. 1315, 1329-31 (E.D.N.Y. 1982), *aff'd in relevant part*, 695 F.2d 668, 678-79 (2d Cir. 1982).

Date: Feb. 18, 1987

/s/ Louis F. Oberdorfer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 86-1912

INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC.

Civ. A. No. 86-2980

TRANS WORLD AIRLINES, INC., *et al.*

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION
OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO

ORDER

I.

Consolidated Civil Action No. 86-2980 comes before the court on the International Association of Machinists and Aerospace Workers' ("IAM") Motion for Summary Judgment and the National Mediation Board's Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons stated in the accompanying memorandum, it is this 18th day of February, 1987, hereby

ORDERED: that the IAM's Motion for Summary Judgment and the NMB's Motion to Dismiss, or in the Alternative, for Summary Judgment, should be, and are hereby, GRANTED; and it is further

ORDERED: that the complaints in consolidated Civil Action No. 86-2980 should be, and are hereby, DISMISSED.

II.

Civil Action No. 86-1912 is before the court on the IAM's motion for injunctive relief. The undisputed material facts of record establish that Trans World Airlines, Inc., ("TWA") has refused to negotiate with the IAM over the wages, rules and working conditions of its passenger service employees despite a May 23, 1986 certification by the National Mediation Board. This refusal to negotiate with the duly certified representative of its employees violates Section 2, First, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth and Ninth. This unlawful behavior has extended unreasonably the time during which TWA is privileged to unilaterally alter the working conditions of its employees under *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). Accordingly, it is hereby

ORDERED: that Trans World Airlines, Inc., its officers, agents and assigns shall treat with the IAM as the certified collective bargaining representative of the craft and class of passenger service employees, pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and it is further

ORDERED: that Trans World Airlines, Inc., its officers, agents and assigns, shall henceforth be enjoined from making any further unilateral changes in the wages, rules and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act. 45 U.S.C. § 156.

Feb. 18, 1987

3:00 p.m.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-857

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
Applicant,

v.

TRANS WORLD AIRLINES, INC.

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 18, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 10th day of May, 1988.

APPENDIX D

RAILWAY LABOR ACT,
45 U.S.C. §§ 151-188

Section 2. First Duty of carriers and employees to settle disputes. [45 U.S.C. § 152, First]

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2. Fourth Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. [45 U.S.C. § 152, Fourth]

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bar-

gaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during work hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2. Seventh Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 2. Ninth Disputes as to identity of representatives; designation by Mediation Board; secret elections. [45 U.S.C. § 152, Ninth]

If any dispute shall arise among a carrier's employees as to who are representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the

individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 6. Procedure in changing rates of pay, rules, and working conditions. [45 U.S.C. § 156]

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held

with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX E

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

13 NMB No. 72
Case No. R-5610

May 23, 1986

In the matter of the
REPRESENTATION OF EMPLOYEES
of
TRANS WORLD AIRLINES, INC.
Passenger Service Employees

CERTIFICATION

The services of the National Mediation Board were invoked by the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM&AW), on January 9, 1986, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Passenger Service Employees", employees of Trans World Airlines, Inc. Later that day, the International Brotherhood of Teamsters (IBT) filed an application. The Independent Federation of Flight Attendants (IFFA), on January 21, 1986, filed an application to represent these employees.

At the time this application was received, these employees were not represented by any organization or individual.

The Board assigned Board Representative Joseph E. Anderson to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Passenger Service Employees and by direction of the Board the Board of Representative was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Board Representative Anderson who was assigned to count the ballots in this case.

Number of Employees Voting:

<i>IAM&AW</i>	<i>IBT</i>	<i>IFFA</i>	<i>Void Ballots</i>	<i>Number of Employees Eligible</i>
Pass. Serv. Emp. 1279	935	36	22	4330

The National Mediation Board further finds that the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the International Association of Machinists and Aerospace Workers, AFL-CIO has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Passenger Service Employees, employees of Trans World Airlines, Inc.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director



(8)
No. 87-2069

Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH E. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

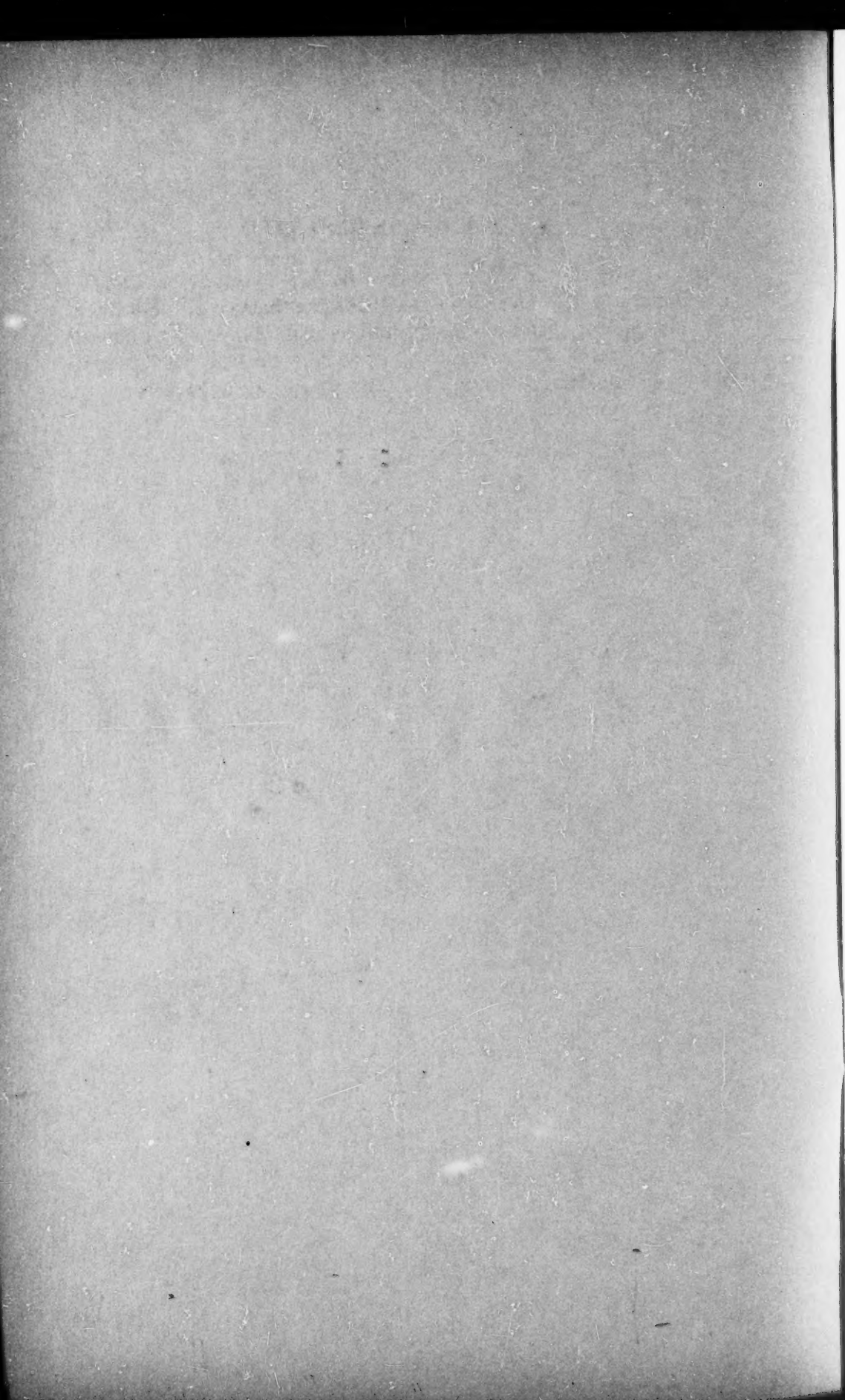
ERIC ROSENFELD
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
757 Third Avenue
New York, New York 10017
(212) 715-9000

Counsel of Record for Respondent

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Respondent

1700



QUESTIONS RESTATED

1. Should the Court overrule *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), holding that § 6 of the Railway Labor Act, because in terms and legislative history it only sets procedures for "change in agreements," does not bar a carrier from changing working conditions pending negotiation of a *first* agreement?

2. Did the court of appeals err in holding that the record did not show that the "drastic measure" (Pet. 12a) of a status quo injunction was "the only practical, effective means," *Chicago & North Western R.R. v. UTU*, 402 U.S. 570, 583 (1971), of enforcing TWA's duty under § 2 First of the Railway Labor Act to exert every reasonable effort to make agreements?

STATEMENT REQUIRED BY RULE 28.1

Trans World Airlines, Inc. ("TWA") has no parent company, nor any affiliates or subsidiaries not wholly-owned by TWA. The caption of this matter lists all parties to the proceeding.

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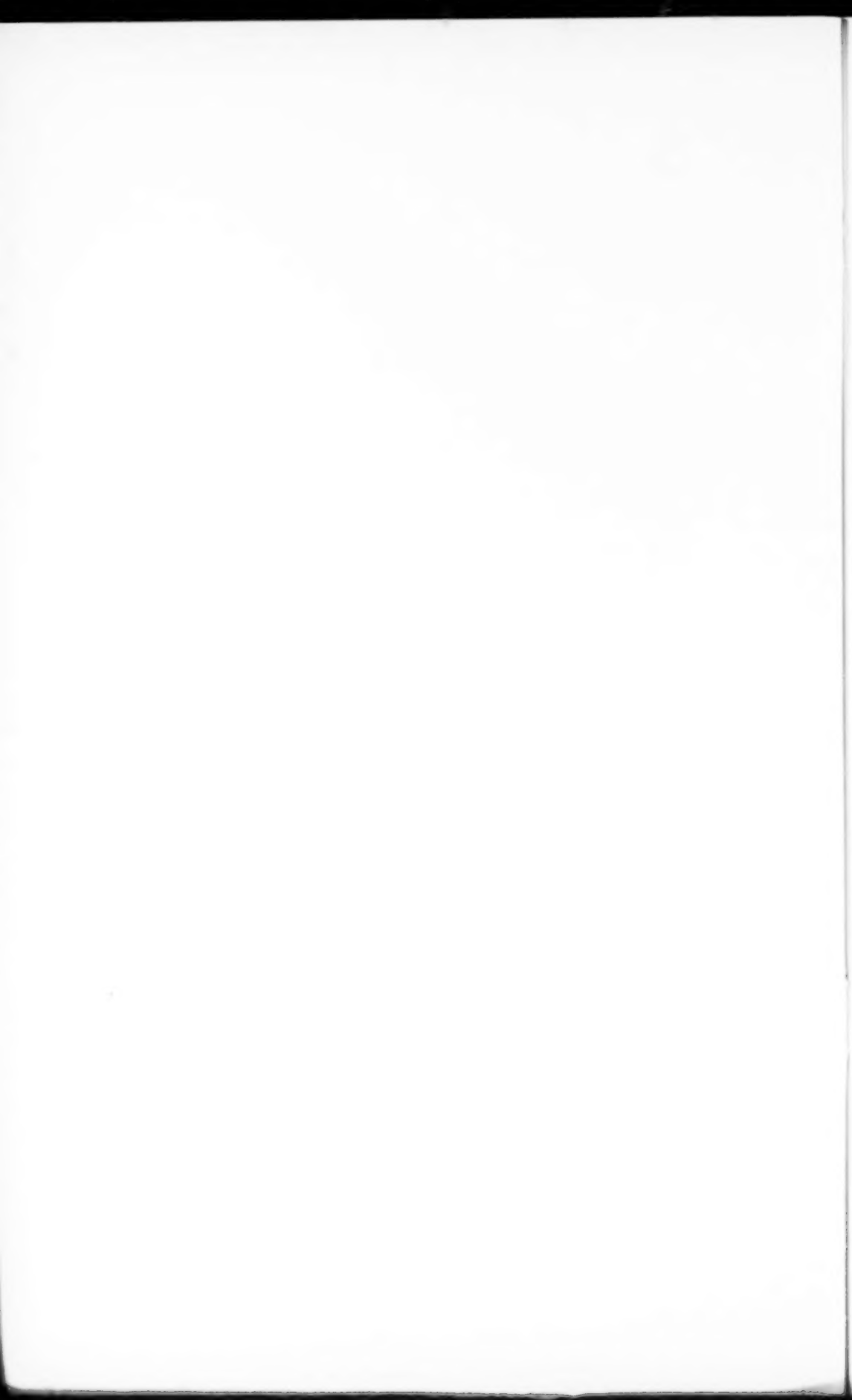
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No. 87-2069

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

This is an action by a newly certified union for an injunction restraining a carrier under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., from changing rates of pay, rules, or working conditions during negotiations for a first collective

bargaining agreement.¹ The Court of Appeals correctly denied relief, both under § 6 of the RLA, 45 U.S.C. § 156, in reliance upon *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) ("*Williams*"), which Petitioner asks the Court to overrule, and under § 2, First of the RLA, 45 U.S.C. § 152, First, in reliance upon *Chicago & North Western R.R. v. UTU*, 402 U.S. 570 (1971) ("*Chicago & North Western*"), which Petitioner essentially ignores. The case is only the second, apparently, in the 54-year history of the Railway Labor Act—*Williams* was the first—to present a union request to enjoin carrier alteration of status quo during a first negotiations as distinguished from a negotiations to change an existing agreement. The case presents no important question of federal law and no conflict with decisions of this Court.

1 Specifically, the case involves the following two post-certification changes in working conditions only:

1. TWA's actual assignment of "ticket lift" and related passenger-boarding duties previously performed exclusively by passenger service employees, to flight attendants as well, announced March 7, 1986, the first day of a strike by the union representing TWA's flight attendants, and implemented July 1, 1986 (Pet. 7a; JA 659), by which date, as it happened, the NMB had conducted the mail-ballot election among the passenger service employees and certified the IAM as the winner of that election, and

2. the planned elimination of a bargaining unit position, reservation agent-in-charge, announced January 2, 1987 (Pet. 22a n. 8; JA 665).

REASONS FOR DENYING THE WRIT

I

WILLIAMS' HOLDING THAT THE STATUS QUO REQUIREMENT OF § 6 OF THE RAILWAY LABOR ACT DOES NOT APPLY DURING NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT SHOULD NOT BE OVERRULED

Section 6 of the Railway Labor Act, 45 U.S.C. § 156, contains two sentences and provides as follows:

"§ 156. Procedure in changing rates of pay, rules, and working conditions.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(emphasis added). In *Williams*, which the IAM asks the Court to overrule, the Court held that the status quo requirement of § 6 did not apply in a case where "there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter," *Detroit & Toledo Shore Line R.R. Co.*

v. *UTU*, 396 U.S. 142, 158 (1969) ("*Shore Line*"). The Court based this holding on the language and legislative history of the first sentence of § 6:

"... *The crucial section 6 is phrased so as to leave no doubt that only agreements, reached after collective bargaining were covered. Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act and section 6 was likewise then amended by adding 'in agreements' to that section's former requirement of notice of 'an intended change affecting rates of pay, rules, or working conditions.'* Compare Sec. 6, 44 Stat. 582, with Sec. 6, 48 Stat. 1197. These additions point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action."

(315 U.S. at 400) (emphasis added), pointing out that its conclusion was compatible both with the authority of a carrier "where no collective bargaining agreements are or have been in effect" and with the carrier's Railway Labor Act "duty to exert every effort to make collective agreements":

"... *Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining.*

"*The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of section 6 against change of wages or conditions pending bargaining and those of section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made*

after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose."

(315 U.S. at 402-3) (emphasis added).

In *Shore Line*, wherein a union sought an injunction to restrain a railroad from establishing new outlying assignments at a time when the union had previously served a § 6 notice to amend the parties' agreement to forbid the railroad from making any outlying assignments at all (396 U.S. at 146), the Court held that the status quo requirement of § 6 included within its scope not only those working conditions covered in the parties' existing collective agreement, but "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute" (396 U.S. at 153). The Court based this holding on the language of the second sentence of § 6:

"We note at the outset that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of 'rates of pay, rules, or working conditions' without any limitation to those obligations already embodied in collective agreements."

396 U.S. at 148, and on the incompatibility of a contrary view of § 6 with "the overall design and purpose of the Railway Labor Act":

"... More important, we are persuaded that the railroad's interpretation of this section is sharply at variance with the overall design and purpose of the Railway Labor Act."

(396 U.S. at 148).

In this case, the IAM asserts that *Williams* is inconsistent with *Shore Line* (Pet. 8), but in *Shore Line* itself the Court refuted any such assertion out of hand:

"... it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6

applied at all. The Court in *Williams* therefore never reached the question of the scope of the status quo requirement in a dispute, such as the one before the Court today, to which that requirement concededly applies.”

(396 U.S. at 158). The present case, of course, like *Williams* and unlike *Shore Line*, involves only the question of whether the status quo requirement of § 6 applies at all.

The IAM appears to assert that *Williams* is inconsistent with *Chicago & North Western Ry Co. v. UTU*, 402 U.S. 570 (1971) (Pet. 11), but that was an action for a strike injunction under § 2, First of the Railway Labor Act. The status quo requirement of § 6 concededly did not apply in the case, because “the parties have exhausted the formal procedures of the Railway Labor Act: notices, conferences, unsuccessful mediation, refusal by the union to accept the National Mediation Board’s proffer of arbitration, termination of mediation, and expiration of the 30-day cooling-off period of § 5, First, 45 U.S.C. § 155, First” (402 U.S. at 573-4). Nor does § 6 apply in the case at bar, as implicitly conceded, one notes, by the IAM’s failure ever to give TWA a § 6 notice.²

The IAM also asserts that *Williams* is inconsistent with the principle of *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), and its progeny (Pet. 8-9). That was a refusal to bargain case, however, under Section 8(a)(5) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(a)(5), the employer basing its refusal to bargain (for a first collective bargaining agreement) on the existence of previously executed individual one-year contracts of employment with 75% of the employees. Taking care “to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an

2 Instead, following receipt of the NMB’s certification of the IAM as the collective bargaining representative of TWA’s passenger service employees, the IAM sent TWA a letter, neither invoking § 6 nor enclosing proposals, asking TWA “to meet . . . to set an agenda to commence negotiations” (JA 106). There is nothing wrong or lacking about IAM’s letter. It is just that it could not be, because there was no agreement in place to change, and it was not, a notice of intended changes in an agreement pursuant to § 6.

act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment" (321 U.S. at 336-7), the Court modified and as modified affirmed a decree ordering the employer to bargain with the union upon request, and to cease and desist from:

"Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof *to forestall collective bargaining or deter self-organization*, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decree *for such purpose or with such effect.*"

(321 U.S. at 341) (emphasis by Court). Thus, *J.I. Case*, like *Williams*, carefully accommodated both, on the one hand, the authority of an employer under a legal duty to bargain for a first collective bargaining agreement to continue to act unilaterally during the negotiations for that first agreement, and, on the other hand, the duty of the employer to bargain for a first agreement. Cf. *Caterpillar, Inc. v. Williams*, 481 U.S. ____, 107 S.Ct. 2425, 2431 (1987) ("Caterpillar is mistaken. First, *J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement.'").

The IAM goes on to argue that the Court applied the principle of *J.I. Case* to employees covered by the Railway Labor Act in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 582 (1944) (Pet. 9). That was an action by the union party to an existing collective bargaining agreement to enforce a Board of Adjustment award requiring the carrier to pay agents the compensation provided by the collective bargaining agreement, and holding that individual contracts providing a different rate of pay, which the carrier subsequently negotiated with agents without giving to the Union the 30 days written notice of intended changes affecting rates of pay required by the then (1930) Railway Labor Act, were ineffective. Enforcing the award, the Court said:

"We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applica-

ble, left the collective bargaining agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law."

321 U.S. at 347. The case is therefore distinguishable on the same essential ground as is *Shore Line*, namely, that it involved unilateral changes by a carrier party to a collective bargaining agreement.

It should not occasion surprise that § 6 of the Railway Labor Act does not contemplate or provide for the case of negotiations for a first collective bargaining agreement. The 1934 Railway Labor Act, from which § 6 in its present form dates, "was negotiated and agreed to by the railroads and the Brotherhoods," *Burlington Northern R. Co. v. B.M.W.E.*, 481 U.S. ____, 107 S.Ct. 1841, 1852 n.13 (1987), and the Brotherhoods, in 1934, already represented most carrier employees. See 1 NMB Ann. Rep. 33 (1935) ("Of 909,249 employees on class I railroads, 646,169, or 71.1 percent, are covered by agreements with national and other trade unions; 218,885, or 24.1 percent, with system associations; and 44,195, or 4.8%, are dealt with on an individual basis without agreements.".)³ Least of all is there the claimed "pressing need" (Pet. 11) to overrule *Williams*. One, this is only the second case, apparently, in the history of the Railway Labor Act to present a claim of carrier alteration of status quo during a first negotiations. By contrast, there have been any number of cases, arising out of renewal negotiations, establishing that the RLA requires all parties both " 'to exert every reasonable effort to make and maintain' collectively bargained agreements, § 2 First, and to abide by the terms of the most recent collective-bargaining agreement until all the settlement procedures provided by the RLA have been exhausted, §§ 5, 6, 10" *Burlington Northern R. Co. v. B.M.W.E.*, 481 U.S. ____, 107 S.Ct. 1841, 1851 (1987) (emphasis added). Two, the IAM has been and is free to bargain during the negotiations over any unilateral change by TWA

3 Airlines were not brought under the Railway Labor Act until 1936. Act of April 10, 1936, ch. 166, 49 Stat. 1189.

which the IAM disputes. That “an employer’s unilateral change in conditions of employment under negotiation” would be an unfair labor practice under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), *NLRB v. Katz*, 369 U.S. 736, 743 (1962), does not, as the IAM suggests (Pet. 11, n.9), remotely require the same result under the Railway Labor Act, in light of “the differences between the statutory schemes,” *Chicago & North Western*, 402 U.S. at 579 n.11, surely reflecting “the difference between the ‘embryo [labor] organizations in the industries covered by the NLRA and the already ‘strongly organized’ railway unions.’” *Bro. of R.R. Tr. v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 385 n. 20 (1969).

In sum, *Williams* has plenty of “vitality,” notwithstanding the Court’s comment in *Shore Line* that it “[was not] pausing to comment upon the present vitality of [the] grounds for dismissing the redcaps’ Railway Labor Act claim [in *Williams*]” (396 U.S. at 158), and the Court should therefore decline, “at this advanced stage of the RLA’s development,” *Burlington Northern*, 107 S.Ct. at 1855, to overrule *Williams*.

II

THE COURT BELOW DID NOT ERR IN HOLDING THAT A STATUS QUO INJUNCTION WAS NOT REQUIRED TO ENFORCE TWA’S DUTY UNDER § 2, FIRST OF THE RAILWAY LABOR ACT TO EXERT EVERY REASONABLE EFFORT TO MAKE AGREEMENTS

§ 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, provides as follows:

“First. Duty of carriers and employees to settle disputes

“It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

In *Chicago & North Western*, a post-*Shore Line* case which the IAM by and large ignores, the Court held that the § 2, First duty to exert every reasonable effort to make and maintain agreements was judicially enforceable by injunction, "on a case-by-case basis" (402 U.S. at 577), only "when such a remedy is the only practical, effective means of enforcing the duty" (402 U.S. at 582, 587). The IAM nowhere claims that it was entitled to a status quo injunction under the *Chicago & North Western* test. Indeed, the IAM recognizes neither that the *Chicago & North Western* "case-by-case" test for a § 2, First injunction is the law, nor that the court below applied the *Chicago & North Western* test in reversing the prospective status quo injunction granted by the District Court.

Instead, the IAM irrelevantly and erroneously argues that the court below's decision is inconsistent with *Shore Line* (Pet. 12-13), the pre-*Chicago & North Western* case affirming the granting of an injunction not under § 2, First but under § 6. And the IAM erroneously attributes to the court below a holding that no § 2, First injunction can lie until and unless the parties have exhausted the procedures of § 6 (Pet. 13-4). The court below did not so hold; it held that the record—which showed that "the first steps [toward an agreement] had not yet been taken" (Pet. 12a), *i.e.*, that TWA had, at first, refused to bargain, but the District Court had then ordered TWA to bargain, and TWA had not appealed that order—did not support a finding that the "drastic measure" (Pet. 12a) of a status quo injunction was "the only practical, effective means" of enforcing TWA's duty to exert every reasonable effort to make agreements. That unnotable holding, leaving the parties under a common § 2, First duty to exert every reasonable effort to make and maintain agreements, presents no important questions, and no circuit court conflict, for this Court to review.

CONCLUSION

The IAM's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Eric Rosenfeld
Jedd Mendelson
Mark A. Buckstein
Michael A. Katz

Attorneys for Respondent